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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

BOEING SATELLITE SYSTEMS INTERNATIONAL INC. et al., Plaintiffs and Appellants, v. ICO GLOBAL COMMUNICATIONS (OPERATIONS) LTD et al., Defendants and Appellants. **AND ADDITIONAL RELATED CROSS ACTIONS.**	B214659 (Los Angeles County Super. Ct. No. BC320115)

APPEAL from a judgment of the Superior Court of Los Angeles County. Emilie H. Elias, Judge. Reversed in part, affirmed in part and remanded with directions.

Munger, Tolles & Olson, Kristin Linsley Myles, Davis S. Han, Brad D. Brian, Daniel P. Collins and Karen J. Ephraim, for Appellants and Respondents Boeing Satellite Systems International, Inc., and The Boeing Company.

Manatt, Phelps & Phillips, Robert A. Zeavin, Becky S. Walker, Barry W. Lee and Ann M. Heimberger; John L. Flynn, for Appellant and Respondent ICO Global Communications (Operations) Ltd.

Adorno Yoss Alvarado & Smith and Patrick A. Cathcart, for Appellant and Respondent Eagle River Investments LLC.

Boeing Satellite Systems, Inc., and its parent corporation, The Boeing Company, appeal from the judgment entered after the trial court denied their motions to set aside the jury's verdicts in favor of cross-complainant ICO Global Communications, Ltd., on ICO's claims of fraud, breach of contract, and tortious interference with contract. The claims arose from separate agreements that called for Boeing Satellite to build and then oversee the launch of an ICO satellite communications network. ICO cross-appeals from the order setting aside the jury's verdict for ICO on its cause of action for fraud in connection with an amended version of the contract to complete construction of the satellites.

Because the undisputed evidence showed that ICO waived its claim for breach of the satellite contract, and because there was insufficient evidence that Boeing Satellite's alleged misrepresentations and concealments caused ICO's alleged damages under the launch contract, we reverse the order denying Boeing Satellite' motions to set aside the verdicts on those grounds. Similarly, because the undisputed evidence showed that the Boeing parent corporation's alleged acts of tortious interference with the launch contract caused ICO no harm, we reverse the order denying Boeing's motion to set aside the verdict on that ground. Finally, because the undisputed evidence showed that ICO was aware of the facts it claims Boeing Satellite misrepresented or concealed in connection with the price of an amended version of the satellite contract, we affirm the trial court's order setting aside the fraud and negligent misrepresentation verdicts against Boeing Satellite

As a result, we direct entry of judgment for the Boeing entities on all causes of action.

I
FACTUAL AND PROCEDURAL OVERVIEW

1. General Background

In 1995, ICO Global Communications contracted with Hughes Space and Communications International (Hughes) to design and build 12 satellites for ICO's

planned global satellite communications network (*the satellite contract*). Under a separate agreement, ICO also contracted with Hughes to procure launch vehicles for, and manage the launch of, those satellites (*the launch contract*). Hughes then contracted to buy 10 Delta III rockets from the McDonnell Douglas Corporation, with 5 slated for ICO under the launch contract, and with the rest to be used for other Hughes customers (the unassigned launches). Hughes was contractually obligated to use its best efforts to enforce ICO's rights and remedies under the launch contract should McDonnell Douglas be in default due to problems with its Delta III rockets.

In 1997, McDonnell Douglas was acquired by The Boeing Company (Boeing) and became a Boeing subsidiary corporation called Boeing Launch Services (Boeing Launch). Three years later, Boeing acquired Hughes, which became a Boeing subsidiary corporation called Boeing Satellite Systems International (Boeing Satellite). Therefore, by 2000, the entire ICO project was to be put in place by two Boeing entities, with one – Boeing Satellite – given the contractual obligation of enforcing ICO's contract rights against the other – Boeing Launch.

Two Delta III rockets carrying payloads for other companies failed upon launch in 1998 and 1999. The launch contract allowed ICO to terminate that contract for default if a launch failure occurred and was not corrected within one year. In August 2000, ICO directed Hughes to terminate the launch contract for default and recover from Boeing Launch the $247 million that ICO had prepaid for its planned launches. When Boeing Satellite acquired Hughes, it also acquired Hughes's obligation to enforce ICO's launch contract termination rights against Boeing Launch.

The ICO project was delayed for several years, due mostly to ICO's financial difficulties, including a stint in bankruptcy. These delays and changes were memorialized by numerous amendments to the satellite and launch contracts. Although at one point ICO expanded the project to include 15 satellites, due to ICO's financial problems, the project was eventually scaled back to 10.

The final amendments which led to this action were Amendment 25 to the satellite contract and Amendment 5 to the launch contract. Both were negotiated at the same time

and signed in July 2003. Under Amendment 25, ICO agreed to pay Boeing Satellite another $419.6 million to complete a total of 10 satellites under an extended delivery schedule. Under Amendment 5, ICO rescinded its termination for default of the launch contract and received back $155 million of its $247 million. Of that $155 million, $143 million would be held by Boeing Satellite to pay for some of the satellite construction work going forward. The satellites would be launched on rockets other than the Delta III.

In January 2004, ICO terminated both contracts under provisions allowing it to do so for its convenience (i.e., without establishing default), subject to the payment of agreed-upon termination liabilities.[1] ICO then demanded arbitration, claiming that the final contract amendments had been procured by fraud, and that Boeing Satellite had breached certain contractual obligations. Instead of accepting arbitration, Boeing Satellite sued for declaratory relief, contending that ICO had no right to arbitrate its claims because it had terminated the launch and satellite contracts. ICO cross-complained against Boeing Satellite and Boeing on various theories, including fraud and negligent misrepresentation, breach of contract, and tortious interference with contract. Boeing Satellite filed its own cross-complaint against ICO for fraud and other causes of action, contending that, when ICO signed Amendments 5 and 25, it never intended to be bound by those agreements. No arbitration was ever held.

2. Trial Proceedings

The case went to trial on ICO's six causes of action in its cross-complaint against Boeing Satellite: (1) breach of the satellite contract; (2) and (3) fraud and negligent misrepresentation during the satellite contract Amendment 25 negotiations; (4) breach of the launch contract; and (5) and (6) fraud and negligent misrepresentation in connection

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[1] The parties use the abbreviation "T4C" to represent a contractually-authorized termination for convenience, and the abbreviation "T4D" to represent a termination based on the other party's default. For ease of reference, we will sometimes use these abbreviations.

with ICO's termination for default claim against Boeing Launch under the launch contract due to the Delta III launch failure.

Six causes of action by ICO against parent Boeing also went to trial: (1) tortious interference with the launch contract; (2) tortious interference with the satellite contract; (3) and (4) fraud and negligent misrepresentation in connection with the Amendment 25 negotiations; and (5) and (6) fraud and negligent misrepresentation arising from the Delta III T4D claim.

ICO contended that Boeing Satellite breached the *satellite* contract by failing to provide certain information to show that the price it was charging to make the changes contained in Amendment 25 was fair and reasonable, an obligation imposed upon Boeing Satellite by paragraph 22.3(D) of that contract. ICO contended that Boeing Satellite committed fraud during the Amendment 25 negotiations by either concealing or making false representations that its price structure for Amendment 25 was based on the "cost of delay" method, which had been used for all previous contract amendments. Instead, according to ICO, Boeing Satellite used the far more expensive "cost to complete" method, which was akin to pricing a new contract from scratch by including the cost of other items.

ICO contended that Boeing Satellite breached the *launch* contract by: (1) failing to disclose that it had been directed by Boeing Satellite to work together with Boeing Launch to defeat ICO's launch contract T4D, and by its failure (and that of its predecessor, Hughes) to disclose that Hughes had effected its own termination for default of Delta III launches it had purchased on its own account; and (2) by failing to otherwise take the steps necessary to enforce ICO's T4D of the launch contract. The same conduct was also alleged as the basis of a fraud cause of action against Boeing Satellite in connection with the Amendment 5 negotiations. As a result of this misconduct, ICO alleged, it received back only $155 million of the $247 million it paid for the Delta III launches instead of a full refund.

Finally, ICO contended that the parent Boeing company was a party to the misrepresentations made by Boeing Satellite in connection with the launch and satellite

contracts, and tortiously interfered with both contracts by directing the alleged misconduct of Boeing Satellite.[2]

Boeing Satellite's two causes of action in its cross-complaint against ICO for fraud also went to trial.[3]

After the evidence was presented, but before the jury began deliberations, the trial court granted a directed verdict on the four fraud and negligent misrepresentation claims alleged against parent Boeing, as well as for ICO's claim against Boeing for tortious interference with the satellite contract. As a result, the only remaining claim against Boeing that went to the jury was for tortious interference with the launch contract. All six of ICO's causes of action against Boeing Satellite were submitted to the jury, as were Boeing Satellite's remaining causes of action against ICO.

The jury found for ICO on all the remaining causes of action except for the claim that Boeing Satellite had breached the launch contract. The jury found that even though Boeing Satellite breached the launch contract, Amendment 5 of that contract represented an accord and satisfaction of an honest dispute between ICO and Boeing Launch, and therefore awarded no contract damages. The jury awarded ICO fraud damages of $91.6 million against Boeing Satellite in connection with the launch contract, and awarded the same amount against Boeing for tortious interference with the launch contract. For breach of the satellite contract and for fraud in connection with Amendment 25 of that contract, the jury awarded $279 million against Boeing Satellite.

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[2] ICO did not sue Boeing Launch, with whom it did not have a direct contractual relationship.

[3] Although litigation started with Boeing Satellite's complaint for declaratory relief, that claim was dismissed, and the case proceeded to trial primarily on ICO's cross-complaint, as well as on Boeing Satellite's cross-complaint. Several other causes of action asserted by the parties were resolved earlier by way of demurrer, summary judgment, or voluntary dismissal. Because they are not at issue on appeal, we do not discuss them. (But see fn. 8, *post.*)

The jury also found that Boeing Satellite and Boeing acted with malice and therefore awarded punitive damages of $29.5 million against Boeing Satellite and $177,086,242 against Boeing.

The jury found for ICO on Boeing Satellite's claims that ICO committed fraud by never intending to be bound by Amendment 25 when it executed that agreement.[4]

3. Posttrial Motions

A. Satellite Contract

Boeing and Boeing Satellite brought motions for new trial or judgment notwithstanding the verdict (JNOV) as to each adverse verdict. The trial court granted Boeing Satellite's JNOV motion on the cause of action for fraud in connection with the pricing of Amendment 25 to the satellite contract, finding that because ICO knew the facts about Boeing Satellite's price structure, ICO could not have actually or justifiably relied on any misrepresentations or concealment by Boeing Satellite.

Critical to the trial court's analysis were certain contractual changes made in the satellite contract amendments that led up to Amendment 25. Amendment 7, signed in September 2000, added three satellites to the project, for a total of 15. Amendment 14, signed in February 2001, was entered in recognition of ICO's ongoing delays and obligated the parties to enter good faith negotiations to revise the contract price "to reflect the cost incurred" by Boeing Satellite from the agreed-upon delivery extension. This "cost of delay" language was not changed until Amendment 20 was signed in August 2001.

The trial court observed that under Amendment 20, ICO obtained another delay, but agreed to make a $15 million "ramp-up" payment in April 2002. If that payment was not made, then the parties would negotiate a "new program baseline." ICO did not make the ramp-up payment. As a result, Amendment 22 was signed in May 2002. Pursuant to

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[4] Because Boeing Satellite has not appealed from the adverse judgment entered on its cross-complaint against ICO, we do not discuss that part of the action.

that amendment, ICO and Boeing Satellite agreed to negotiate "a new program baseline consisting of a revised Satellite delivery schedule and Contract Price." Because the satellite contract defined the term "contract price" to mean "the total amount of the contract as may be varied" by the parties, the trial court concluded that ICO had agreed to a new price methodology in place of the previous cost of delay price structure, and that Boeing Satellite committed no fraud.

Boeing Satellite also moved for JNOV on the claim for breach of the satellite contract on several grounds, including: that ICO impliedly waived its contractual right to receive cost data information from Boeing Satellite under Article 22.3(D) of that contract, both by failing to arbitrate that issue beforehand, and by agreeing to Amendment 25 despite ICO's knowledge that it had not received the data. The trial court denied that motion.

B. Launch Contract

Boeing Satellite moved for JNOV of the launch contract fraud claim on several grounds, including: that any misrepresentations or concealments by Boeing Satellite did not cause ICO to accept less than a full refund from Boeing Launch. The trial court denied that motion as well.

The Boeing parent corporation moved for JNOV on the claim for tortious interference with the launch contract on several grounds, including: that no conduct by Boeing caused ICO to settle its T4D claim for less than the full amount. The trial court denied that motion.[5]

The trial court also eliminated or reduced the jury's award of prejudgment interest on ICO's claims, refused to award prejudgment interest on the breach of satellite contract

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[5] The only cause of action that was submitted to the jury as to which there was no JNOV motion was ICO's breach of the launch contract claim. As we mentioned earlier, the jury found that Boeing Satellite breached the launch contract but that Amendment 5 to that contract was an accord and satisfaction based on an honest dispute between the parties. No JNOV motion was filed and neither party argues on appeal any errors in connection with the breach of launch contract cause of action.

verdict, and reduced the punitive damage award. A combined judgment of more than $577 million in actual and punitive damages, along with more than $35 million in prejudgment interest, was entered for ICO.

II
STANDARD OF REVIEW

The trial court has the power to take away a jury's verdict and enter a judgment notwithstanding the verdict in cases where a motion for directed verdict for the losing party should have been granted. (Code Civ. Proc., § 629.) The motion is a challenge to the sufficiency of the evidence. The trial court may not weigh the evidence or judge the credibility of witnesses, and must accept the evidence tending to support the verdict unless on its face it is inherently incredible. A JNOV may be granted only when, after disregarding conflicting evidence and indulging in every legitimate inference that can be drawn from the winning party's evidence, there is no substantial evidence to support the verdict. (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1320 (*Carter*).)

We review an order *denying* a JNOV motion to determine whether there is substantial evidence to support the verdict. As does the trial court, we consider the evidence in the light most favorable to the prevailing party, and indulge all legitimate and reasonable inferences to affirm the verdict. (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1143-1144.) This does not mean we can blindly seize on any evidence to support the verdict. The evidence must be credible and of solid value. Inferences drawn from the evidence must be the result of logic and reason, not speculation or conjecture. (*Id.* at p. 1144.)

When the trial court has *granted* a JNOV motion, the standard of review is essentially the same. (*Carter, supra,* 122 Cal.App.4th at p. 1320.) If we determine there was substantial evidence to support the verdict, then the order granting the JNOV motion must be reversed. (*Tan Jay Internat., Ltd. v. Canadian Indemnity Co.* (1988) 198 Cal.App.3d 695, 709.)

III
DISCUSSION

1. ***Satellite Contract Fraud****: ICO Was Not Misled by Boeing's Alleged Misrepresentations; the Order Granting JNOV on the Satellite Contract Fraud Claim Was Correct*

A. ICO's Satellite Contract Fraud Theory

ICO contends that the seeds of its Amendment 25 satellite contract price fraud claim were first planted by Boeing Satellite price proposals in response to ICO requests for further delays made in 2001, prices which ICO believed were grossly overinflated. According to ICO, the April 2001 ($104 million for 15-month delay) and September 2001 ($164 million for a 21-month delay) price proposals were way out of line for completing all 15 satellites that were planned as of that time because those satellites were nearly finished.[6] ICO also objected that both proposals included items such as incentives and the cost of money which fell outside the permissible scope of the costs of delay methodology.

ICO contends that Boeing Satellite continued this practice through its June 2002 rough order of magnitude (ROM) proposal, which sought $400 million for a 27-month delay to complete just 12 satellites. A Boeing Satellite internal analysis that ICO did not see until the document was obtained in discovery showed that the reduced scale of work contemplated by the ROM actually resulted in a $166 million cost savings to Boeing Satellite. The author of the document wrote that ICO would see only the ROM totals, and would never see the analysis.

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[6] By this time, according to ICO Senior Vice President Robert S. Day, Jr. (Bob Day), one ICO satellite had been launched but failed to operate, one was nearly 100 percent complete, six were between 90 to 95 percent complete, and the other four were about 85 percent complete. In June 2001, a second ICO satellite was launched. Neither satellite was launched on a Delta III rocket. The second ICO satellite failed in early 2003, long after its June 2001 launch, but was later repaired. ICO made no claims against Boeing Satellite in connection with these first two ICO satellites, and the jury was instructed accordingly.

ICO finally contends that even though it rejected all three proposals because they were too high, the inflated proposals effectively raised ICO's expectations as to how much it should pay when it later negotiated Amendment 25.

Before the Amendment 25 negotiations began, parent company Boeing directed Boeing Satellite and Boeing Launch to work together to develop a joint negotiation strategy for dealing with ICO in regard to both the satellite contract and the T4D of the Delta III launches under the launch contract. Internal Boeing documents show one Boeing official asking whether there were "schemes" that could be devised to have ICO pay Boeing Launch's costs of shutting down the Delta III program and switching to another rocket. As part of their joint negotiating strategy, Boeing Satellite and Boeing Launch agreed on certain objectives: elimination of ICO's Delta III T4D; recovery of all Delta III conversion costs if ICO decided to T4C instead; and the Delta IIIs would be sold at full cost, with no loss of earnings.

According to ICO, Boeing Satellite, as part of this joint strategy, concealed or misrepresented certain key components of its $400 million proposal during the Amendment 25 negotiations: that it was only looking to make a reasonable profit, was not pricing a new deal from scratch, and was still charging for delay costs only, not the cost to complete the satellites; that it never said it was no longer obligated to charge for only its delay costs as a result of the elimination of that requirement in Amendment 22; that it included the cost for defective work that Boeing Satellite had previously borne; that it was charging inflated risk reserves; that ICO was entitled to a credit for tropospheric modifications it had added to the project and then cancelled; and that Boeing Satellite wanted ICO to cover Boeing Launch's Delta III losses.

The motive behind this, ICO contends, was Boeing's plan, later abandoned, to launch its own satellite communications network that would compete with ICO's planned system.

B. The Trial Court's Satellite Contract Fraud JNOV Ruling and Issues on Appeal

A party suing for fraud cannot rely on the alleged misrepresentations, or claim he was misled by concealed information, if he knows the actual facts. (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1264; *Sills v. Siller* (1963) 218 Cal.App.2d 735, 741.)[7] The trial court granted Boeing Satellite's JNOV motion on the satellite contract price fraud cause of action because it concluded the evidence indisputably showed that ICO knew Boeing Satellite was no longer basing its price proposal under the old cost-of-delay method, but was instead proposing to charge for a wide range of other items. According to the trial court, this evidence included both statements made and documents prepared by ICO executives, as well as the terms of Amendment 22, which no longer referred to the cost of delay as the basis for future price proposals but instead obligated the parties to bargain for a revised "contract price," which the satellite contract defined as the total contract price.

ICO's cross-appeal contends the trial court erred because there was substantial evidence that during the Amendment 25 negotiation process in 2002-2003, Boeing Satellite: (1) misrepresented that it was still pricing based on the cost of delay method, Boeing Satellite's costs were higher than ICO believed, it was not pricing items as a new deal from scratch, and it was only looking to make a reasonable profit; and (2) concealed that it was now pricing based on the cost to complete method and that its costs included work already completed, excessive reserves, and repair costs for its own defective work. According to ICO, the supposed fraud committed during these negotiations was simply an extension of certain concealments and misrepresentations contained in Boeing

[7] Because the element of reliance is the same for both fraud and negligent misrepresentation, (*Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519), our discussion applies to the latter cause of action as well. The same principle applies to the causes of action for fraud and negligent misrepresentation in connection with the launch contract fraud claim.

Satellite's 2001 and 2002 price proposals for contract extensions that ICO rejected. ICO contends those falsely inflated prices formed the backdrop for its evaluation of Boeing Satellite's offers during the Amendment 25 negotiations, leading ICO to conclude that the higher prices were warranted.[8]

C. What ICO Indisputably Knew

(i) *No Reasonable Jury Could Conclude That ICO Had Been Defrauded*

(a) *Boeing Satellite's Extension Proposals and ROM*

We begin with the 15-month and 21-month extension proposals requested by ICO in, respectively, April and September of 2001. Boeing Satellite's bids for those extensions were, respectively, $104.2 million and $164.2 million. ICO's Bob Day rejected both offers because they were too high. ICO contends that even though it rejected the offers, they raised ICO's sights enough to make the inflated price that found its way into Amendment 25 look nearly reasonable.

However, ICO executive John Zukoski received Boeing Satellite summaries for both offers which showed that the delay costs requested for the then-remaining 10

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[8] ICO's original cross-complaint included a cause of action for economic duress or coercion, but that claim was dismissed after the trial court granted Boeing Satellite's motion for summary adjudication. During trial, ICO's witnesses continually tried to testify about how Boeing Satellite forced or pressured ICO, or how ICO had no choice but to agree to Amendments 25 and 5 because no one else could complete its satellites, but objections to such testimony were repeatedly sustained.

ICO does not challenge those evidentiary rulings, or the trial court's summary adjudication ruling, but its appellate arguments sometimes hint at this coercion theory. Because ICO has waived any issues concerning the trial court's rulings on this notion, we do not consider those rulings.

Another related pre-trial ruling occurred when the trial court granted Boeing Satellite's summary adjudication motion as to ICO's cause of action for breach of fiduciary duty. In accord with that ruling, the trial court instructed the jury that Boeing Satellite was neither an agent nor fiduciary of ICO, and that those parties were merely ordinary contracting parties in an ordinary commercial relationship. As a result, our analysis is based on the concept that ICO and Boeing Satellite were bargaining at arms' length.

satellites were, respectively, $21.7 million, plus $10 million to cover ICO's delays in certain incentive payments (15-month April proposal), and $37 million, plus $14.24 million for those payment delays (21-month September proposal). The difference between those amounts and the total cost -- $72.5 million for the April extension and $112.96 million for the September extension – would have gone to the tropospheric modifications and satellites F13-15 that ICO later cancelled. In fact, as part of its PowerPoint demonstration at a February 5, 2003 negotiation session with Boeing Satellite, ICO pointed out these numbers in order to show that the price Boeing Satellite was setting for what would become Amendment 25 was inconsistent with the much lower extension costs proposed by Boeing Satellite for the April and September 2001 proposals.

In short, ICO knew that the total price of Boeing Satellite's 2001 extension proposals included far more than just the delay costs on the 10 remaining satellites, and ICO believed that Boeing Satellite's asking price for Amendment 25 was *inconsistent* with those proposals because it was so much higher. As a result, no reasonable juror could conclude that those earlier proposals softened-up ICO so that it would accept as reasonable the $400 million price tag placed on Amendment 25, which included a similar delay and fewer satellites.

Alternatively, we agree with the trial court that having rejected the April and September 2001 proposals because they were too high, ICO could not bootstrap them on to the reliance component of its cause of action for fraud during the Amendment 25 negotiations that ended nearly two years later. (*Stone v. Foster* (1980) 106 Cal.App.3d 334, 344-345 [jury verdict for plaintiff on fraud claim brought as part of malpractice action against plastic surgeon reversed in part because even though there was evidence that the defendant offered her money and free corrective surgery if she dropped her action, and threatened to make himself judgment proof if she did not, "[t]here was no evidence of reliance by plaintiff, since she rejected the offer and continued the suit."].) Likewise here, ICO rejected both 2001 extension offers, then began negotiations anew in October 2002. We therefore hold that ICO cannot claim reliance on those offers as a

basis for its later reliance on Boeing Satellite's proposals made during the Amendment 25 negotiation process.

The same is true of the June 2002 ROM. Day acknowledged that the ROM was merely an estimate. After getting information from Boeing Satellite, Day was able to determine that the ROM reflected a price of $400 million for the proposed extension, which Day believed was much too high. His skepticism about that price continued into and throughout the Amendment 25 negotiation process, leading Day to request specific cost support information from Boeing Satellite. The only logical inference from this evidence is that Day did not adversely rely on that estimate.

(b) *Representations and Concealments that Occurred During the Amendment 25 Negotiation Process*

That leaves us with only those purported misrepresentations and concealments that occurred during the Amendment 25 negotiations, most of which concerned the switch from a cost-of-delay price methodology to one that was based on Boeing Satellite's cost to complete the remaining satellites, along with items such as technical problems, repeat work, program delays, past overruns, future cost risk, and lost profits.

The trial court relied on three key pieces of evidence to support its finding that ICO knew all these things were included in the price before signing Amendment 25. The first was trial exhibit 1507, a Power Point presentation slide prepared by ICO that ICO used during a February 5, 2003 negotiation session with Boeing Satellite. The slide listed each side's competing version of how the proposed changes should be priced. It said that ICO believed price changes must be based upon the fair and reasonable costs and profits of the requested changes, which included another delay and the deletion of satellites 13-15. ICO's presentation said ICO perceived that Boeing Satellite wanted a "new deal from scratch" that would incorporate costs and assumptions from any source, including: all program delays; past program overruns; Boeing Satellite's technical problems (liens), including repeat work; future cost risk (cost reserves); the lost earnings from cancelled work; and no write-offs for previously overbooked earnings.

The presentation went on to note that Boeing Satellite's offers were "incredibly high" and were inconsistent with the contract, with the amount of work remaining, and with earlier price proposals from Boeing Satellite. Bob Day testified that the viewpoints contained in exhibit 1507 represented ICO's understanding of Boeing Satellite's position on the issues, and that the points made in the presentation were conveyed at the meeting by ICO representatives. David Bagley, ICO's lead negotiator, helped prepare trial exhibit 1507 and testified that the price viewpoints that ICO attributed to Boeing Satellite in the Power Point demonstration came from his conversations with Boeing Satellite. He also testified that at the February 2003 negotiation session, Bill Collopy of Boeing Satellite said his company could charge whatever it wanted.

The second key piece of evidence came from Bagley's testimony that when he asked Boeing Satellite in October or November of 2002 why its offer was so high, he was told that Boeing Satellite wanted to get back the profits lost when ICO cancelled satellites F13-15, and that Boeing Satellite "*changed the pricing*" to make itself "*whole and profitable on this program.*" (Italics added.) Bagley told them that violated the contract, which he believed still allowed for only the cost of delays.

The third key piece of evidence relates to Bagley's complaint to Boeing Satellite that its changed pricing method violated the contract because Boeing Satellite could charge for only its delay costs. As the trial court noted, Amendment 20 omitted references to the cost of delay that had appeared in numerous earlier amendments, stating instead that the parties would agree to a new program baseline if the April 15, 2000, $15 million ramp-up payment was not made. When ICO failed to make the $15 million payment, Amendment 22 was negotiated, with ICO agreeing to negotiate for a new program baseline that included a revised contract price, a term defined by the satellite contract to mean the total overall price. As a result, the trial court instructed the jury that: ICO and Boeing Satellite agreed to eliminate the requirement that the price for Amendment 25 would reflect Boeing Satellite's delay costs, meaning that Boeing Satellite was not required to base its price proposals on those costs (instruction No. 31); and that ICO and Boeing Satellite agreed in Amendment 22 that ICO's failure to make

the April 2002 ramp-up payment obligated the parties to negotiate in good faith for a new schedule and contract price (instruction No. 32).

Based on all this, the trial court concluded that ICO, through Day and Bagley, knew that Boeing Satellite had changed its price methodology way beyond the parameters of delay costs, and that, given the changed terms of Amendment 22, a sophisticated business entity like ICO could not rely on the notion that Boeing Satellite was still basing its price proposals on the delay costs alone. Other evidence supports this finding.

Bob Day testified that when he saw the initial Boeing Satellite offer in October 2002, he was "surprised, confounded, and flabbergasted" at the amount. He told Boeing Satellite that it could charge for only delay costs, and that the $400 million offer was way too high. Bill Scanlon of Boeing Satellite told him Boeing Satellite was underwater on the contract and needed to recoup lost profits from F13-15, and that the cost to complete the remaining satellites was higher than Day thought.

Day sent two e-mails to various ICO executives concerning this situation. The first, dated November 13, 2002, said he had just received the Boeing Satellite counter-offer, which was "not good and it is very high." According to Day, Boeing Satellite came in at $358 million more than ICO's offer. Day wrote that Scanlon provided three reasons for the high price: (1) "The old contract (Amendment 7) was a package deal and most of their profit was in [satellites] F13 through F15. They need to recoup that . . . ."; (2) Boeing Satellite (and its predecessor Hughes) had been in a negative cash position since 1995 and needed to recoup that amount, which was not yet determined; and (3) the cost to complete the satellites was much higher than ICO thought. Day concluded that he disagreed with those reasons, "especially in the magnitude of the prices that they are coming back with."

Day's second e-mail on this topic was sent November 15, 2002, to numerous ICO executives. Day recounted a conversation with Keith Reiley of Boeing Satellite where Day said he was "flabbergast[ed] . . . with such exorbitant prices." Day told Reiley that Boeing Satellite was taking a ludicrous position, and asked whether Boeing Satellite was

trying to drive ICO out of business. Reiley told Day that the earlier contract that included satellites F13-F15 was a package deal, and Boeing Satellite had "to get back to where they were." Reiley also said Boeing Satellite had lost money before F13-15, that ICO had not paid enough for the work already completed, and that Boeing Satellite needed to recover for that. Reiley told Day that Boeing Satellite was not trying to drive ICO out of business, and was just trying to make a profit. Reiley also told Day that "If you think Boeing is going to drop the price $400M, you're wrong." Day concluded his e-mail by warning that "[t]his may get ugly before it gets better . . . ."

ICO President Craig Jorgens testified that he recommended approval of Amendment 25 even though the prices were high and unattractive because it was the best alternative for ICO.[9]

When these threads are stitched together, they conclusively show that ICO wrongly believed Boeing Satellite was limited by contract to charging for only the cost of delay, and was told by Boeing Satellite that it was in fact including the various cost categories about which ICO complains it was misled. It also shows that ICO was told by Boeing Satellite that it had, in the words of ICO lead negotiator Bagley, "changed the

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9 Jorgens explained that the combined agreements had several benefits for ICO. Because of the prepayment account funded by the Delta III refund, the agreements provided ICO with an extremely beneficial cash flow from 2003 through 2005. That was very important to ICO, Jorgens testified, because of ICO's fund-raising difficulties. Amendment 25 included a new termination liability schedule that allowed ICO to terminate the contract for convenience through June 2004 at no additional cost. As a result, the large uncertainty of the satellite contract and the risky Delta III rockets were both removed, Jorgens testified. David Bagley, who was ICO's chief negotiator for Amendment 25 and Amendment 5, testified that the Delta III deal removed the risk those rockets posed and gave ICO a "beneficial cash resolution." Jorgens testified that the deal also allowed ICO to remain in compliance with performance milestones that were necessary in order to keep its FCC license. Jorgens testified that he explained all of these benefits to ICO's board of directors, which authorized the execution of Amendments 25 and 5 in July 2003.

pricing" to recoup its losses on the program and to cover other costs.[10] Even though Day disagreed with that and believed the price was too high, ICO agreed to a price for Amendment 25 that was largely the same as Boeing Satellite's initial proposals, including the June 2002 ROM that Day estimated came to $400 million. Finally, as Day's own testimony shows, Boeing Satellite told him its *costs to complete* were higher than Day thought, meaning Day was in fact aware that Boeing Satellite was charging at least in part based on those costs, not the costs of delay. No reasonable jury could find otherwise.

(ii) *ICO's Inference of Materiality Was Rebutted as a Matter of Law*

ICO contends the trial court erred by granting JNOV because ICO raised an inference or presumption of reliance based on the materiality of the misrepresentations, which Boeing Satellite failed to rebut. (See *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977-978 (*Engalla*) [presumption or inference of reliance sufficient to avoid summary judgment arises when an alleged misrepresentation was material, unless there is evidence conclusively rebutting reliance].) We agree that a reasonable inference may constitute substantial evidence to defeat a JNOV motion, but conclude that any such inference raised by ICO was rebutted as a matter of law.

According to ICO, the Power Point slide it prepared and presented at the February 5, 2003, negotiation session did not represent ICO's actual knowledge concerning Boeing Satellite's cost methodology, but instead expressed ICO's mere suspicions about those items, suspicions that were laid to rest when ICO was told at the meeting that Boeing Satellite was not pricing as if it were "a new deal from scratch" and wanted nothing more than to make a reasonable profit on the deal.

We reject ICO's contention that the PowerPoint presentation represented no more than its "perceptions" about Boeing Satellite's price methodology, and did not represent

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10 In January 2003, Day e-mailed Bagley with an analysis designed to understand Boeing Satellite's accounting perspective on the Amendment 25 negotiations. In it, Day acknowledged that ICO had cancelled Boeing Satellite's high profit work – satellites F13-15 – and left it with "low profit or overrun work."

ICO's actual knowledge. "Perception" is derived from "perceive," which is defined as, "to attain awareness or understanding of." (Webster's 10th New Collegiate Dict. (1995) p. 861.) Bagley said the points listed in the presentation came from what he was told by Boeing Satellite. Therefore, those statements were more than some mere unanswered query, and instead represented conclusive evidence of ICO's actual knowledge.

We next consider the effect of statements made by Boeing Satellite executives at the same February 5, 2003 negotiation session with ICO. Although Don McKenzie of Boeing Satellite testified that he told ICO *before* the February 5, 2003 meeting that Boeing Satellite was not pricing a new deal from scratch, there is no evidence such a statement was ever made at that meeting. Instead, ICO relied on a talking points memo that Bill Scanlon of Boeing Satellite prepared for Boeing Satellite executive William Collopy in advance of that meeting. Scanlon did not make that statement at the meeting itself, and did not recall whether anyone else did. ICO argues that the jury could have reasonably inferred the statement was made at the meeting because it was part of Collopy's talking points for that meeting. The trial court found the inference unreasonable, especially in light of the fact that nobody from ICO who was at that meeting testified the "no new deal from scratch" statement was ever made there. In fact, although ICO called Collopy as a witness, it did not examine him about the February 2003 meeting, and when Boeing Satellite brought up the subject on cross-examination, the trial court sustained an ICO objection that the questions fell outside the scope of its direct examination. ICO President Craig Jorgens testified that he signed Amendment 22 and was very familiar with its contents. Jorgens admitted that he knew making the April 2002 ramp-up payment was the only way to preserve the cost of delay methodology for the amendments.

However, even if nobody at Boeing Satellite ever expressly stated that its new price methodology was justified by Amendment 22, the new price language was in that agreement and ICO is deemed to know of, and be bound by, its terms. (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 710; *Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1589; *McClure v. Cerati* (1948) 86 Cal.App.2d 74, 84-85.) When

interpreting a contract, the objective intent as evidenced by the contract terms governs, not the subjective intent of the parties. (*People v. International Fidelity Ins. Co.* (2010) 185 Cal.App.4th 1391, 1396.) Absent evidence that ICO justifiably relied on misrepresentations that the new price methodology provided by Amendment 22 had been abandoned by Boeing Satellite during the Amendment 25 negotiation process, ICO cannot claim Amendment 22 did not apply. (See *Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, 393 [in cases of fraud in the inducement based on misrepresentations concerning the contents of a contract, the plaintiff must show reasonable reliance on the misrepresentations in order to excuse his failure to become aware of its terms].) For the reasons already discussed, there is no substantial evidence of reliance by ICO that can overcome the terms of Amendment 22.

ICO's fifth contention regarding the trial court's use of instruction No. 31 appears to be a rehash of its previous arguments – that ICO continued to believe the cost of delay method still applied, and that Boeing Satellite made statements to support that belief and concealed facts to the contrary. Again, we have already discussed and rejected these points.

(iii) *Effect of Excluded Causation Testimony on the Court's Analysis*

ICO also contends that the trial court's satellite contract fraud JNOV analysis was defective because the court had earlier erred by excluding testimony from Day about how he relied on Boeing Satellite's proposals. Day testified that all the communications with and information from Boeing Satellite during the Amendment 25 and Amendment 5 negotiations were "very important" to ICO's determination as to how to proceed, and that he relied on the things he was told. However, when asked on direct examination how he would have acted differently had he known certain facts were different than he believed, the trial court sustained Boeing Satellite's objections to the testimony because it was speculative. ICO contends the trial court erred when it sustained those objections, and that we must therefore assume ICO's reliance was proven.

We need not decide whether the trial court erred by excluding Day's testimony because even if error occurred, it was harmless. A party's testimony about his own reliance is legally insufficient if the reliance was not justified. (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 54-55.) "[A] party plaintiff's misguided belief or guileless action in relying on a statement on which no reasonable person would rely is not justifiable reliance. [Citation.] 'If the conduct of the plaintiff in light of his own intelligence and information was manifestly unreasonable, . . . he will be denied a recovery.' [Citations]." (*Ibid.*) Because the undisputed evidence shows that ICO knew about Boeing Satellite's changed pricing methodology, Day's testimony that he would have acted differently does not alter our conclusion that there was no actual reliance by ICO in the first instance. Combined with the fact that Day was allowed to testify that he relied on the things Boeing Satellite told him in determining how to proceed with the negotiations, and that he believed ICO's October 2002 offer was based on the 2001 extension proposals, we conclude that any error in excluding evidence by Day concerning how he would have acted differently was harmless, and therefore had no improper effect on the trial court's JNOV analysis.

D. Alleged Concealments ICO Claims It Did Not Know

In addition to the affirmative misrepresentations discussed above, ICO contends Boeing Satellite concealed the following: (1) that Boeing Satellite's costs to complete satellites F3-F12 were $38.2 million, not the $395 million ICO was charged; (2) that ICO was entitled to a credit for some of the cancelled tropospheric modification work; and (3) that Boeing Satellite was trying to cover Boeing Launch's Delta III conversion costs in the Amendment 25 price. We take each in turn.

ICO's cost of completion argument is based on Trial Exhibit 173, an internal Boeing Satellite analysis prepared as part of the June 2002 ROM. Page 9 of that document is a financial assessment of switching to a reduced eight-satellite constellation. In a box captioned "CURRENT PLAN," under the heading "COST," are various items, including one designated "To Go." For satellites F1-F12 (of which two had been

launched), the To Go cost was $38.2 million. This, according to ICO, is evidence that Boeing Satellite lied when it said its true costs to complete were much higher than ICO thought. A full examination of the document, along with the undisputed testimony from those familiar with the document or the cost approach exercise undertaken by Boeing Satellite, shows that ICO is wrong.

Page 4 of the document includes cost factor tables for satellites F3-F12, and sets forth an estimate of $28 million per satellite to complete them, at a total cost of $279.2 million. This is reflected on page 9, in the box captioned "PROPOSED CHANGES" that sits right below the "CURRENT PLAN" box just described. Across from the subject heading "PROGRAM EXTENSION," the assessment sets forth the $279.2 million price. Elsewhere, the document recalculates the new total price of the satellite contract at $2.02 billion.

Doug McKenzie, who was the Boeing Satellite deputy program manager for the ICO satellite project, testified that the reference to "CURRENT PLAN" in exhibit 173 meant "what we had before the new proposal," meaning the then-operative version of the satellite contract under Amendment 7. The "To Go" number under the current plan was a historical number reflecting the amount ICO had left to pay off under Amendment 7, a number that was no longer valid because of all the intervening contract changes and extensions, and because there was not yet a new contract price to keep that figure in place as a valid to-go number. Although ICO tries to raise a conflict about this, none exists. ICO points to no evidence that the "To Go" figure represented something other than what McKenzie said it meant, and that the $279 million figure represented anything other than Boeing Satellite's calculation of the cost to complete under the new pricing methodology.

As for the tropospheric modifications, a $118 million credit for that work actually appears on page 8 of Trial Exhibit 173. Although ICO contends its right to this credit was concealed from it, it points to no evidence that the credit was not applied in Amendment 25. Absent speculation as to where or whether that credit was given, there is no evidence that ICO was harmed because Boeing Satellite did not reveal ICO's right to that credit.

The same is true of the plan to have Amendment 25 cover the Delta III conversion costs. The evidence cited by ICO in its appellate brief either makes no mention of it, or refers to recovering those costs in the event of a termination for convenience. Regardless, as with the tropospheric modifications, ICO points to no evidence that such costs were actually included in the Amendment 25 price.

2. ***Satellite Breach Claim:*** *ICO Waived Its Contractual Right to Receive Cost Support Data as a Matter of Law and JNOV Should Have Been Granted*

A. ICO's Satellite Contract Breach Theory

Article 22.3(D) of the satellite contract required Boeing Satellite, as the successor of Hughes, to provide ICO with the same type of information that ICO had access to when it was negotiating the original contract in 1995. The genesis of this provision was the detailed audit and analysis of Hughes's costs that ICO conducted before agreeing to the original satellite contract. This audit was performed by a team of four ICO employees, including Yves Wesse, who later became ICO's contract manager for the satellite contract.

According to Wesse, the original audit team spent two weeks at Hughes meeting with Hughes engineers who would be working on the ICO project. They were given detailed explanations and break-downs on the man-hour costs of various components or tasks, and were also given access to information about the cost of underlying activities for certain tasks. The audit team was able to ask as many questions as it wanted.

Day testified that, pursuant to Article 22.3(D), he requested certain information during the course of the 2002-2003 negotiations over Amendment 25 of the satellite contract and Boeing Satellite did not provide that information.[11] James Albaugh, a

[11] ICO's respondent's brief also mentions Article 22.3(D) in a manner that suggests Boeing Satellite had an affirmative duty to propose a price that was objectively fair and reasonable, and that its failure to do so was a separate breach of contract. The trial court ruled that the contract could not be interpreted in that manner, and that the purpose behind Article 22.3(D) was to provide ICO with sufficient information to determine for itself whether it believed a price proposal was fair and reasonable.

Boeing senior vice president, testified that it was not Boeing's practice to provide the level of information that Day requested. Although Boeing Satellite did provide some cost data information, for purposes of this appeal it concedes that a breach occurred as a result of its failure to provide the same type of information made available to ICO when the satellite contract was first negotiated.

B. Trial Court's JNOV Satellite Contract Breach Ruling and Issues on Appeal

Boeing Satellite contends that assuming it failed to provide the cost support information that ICO requested, and therefore breached article 22.3(D), ICO had to arbitrate that dispute. By failing to do so, and instead agreeing to Amendment 25, ICO waived the breach. Boeing Satellite also contends that ICO's conduct amounted to an implied waiver of the breach as well. Therefore, according to Boeing Satellite, the trial court erred by denying its JNOV motion on those grounds. ICO contends that arbitration

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It appears that ICO's point concerning Boeing Satellite's supposed duty to propose a fair and reasonable price is an attempt to suggest an alternative basis for supporting the trial court's denial of Boeing Satellite's motion for JNOV of the verdict for breach of the satellite contract. However, ICO does not raise this as a discrete issue that is supported by citation to authority and analysis, but instead asks us to ferret out the issue for it. To the extent ICO might claim that the satellite contract should be interpreted to impose a duty on Boeing Satellite to offer a price that was objectively fair and reasonable, we therefore deem the issue waived. (*EnPalm, LCC v. Teitler Family Trust* (2008) 162 Cal.App.4th 770, 775 (*EnPalm*).)

Alternatively, we disagree with ICO's interpretation. Article 22.3(D) states that Boeing Satellite must provide price information upon request so as to demonstrate that its proposal is fair and reasonable. If that is interpreted to mean that the proposal itself must be either objectively reasonable, or at least subjectively reasonable to ICO, then any proposal that ICO disagreed with would automatically result in a breach of contract. We reject an interpretation that could lead to such an absurd result. Instead, we agree that the trial court was correct when it ruled that the provision was intended to do no more than provide ICO with enough information to determine for itself whether it felt the price was fair and reasonable, and inform its options about going forward.

We also note that Wesse testified the origin of the provision was ICO's desire to make sure that Hughes was paid a fair and reasonable price in order to ensure that ICO received a quality product. If that extrinsic evidence were considered, then arguably the provision was as much for the benefit of Hughes/Boeing Satellite as it was for ICO.

was not mandatory under the satellite contract, and that the evidence concerning the elements of implied waiver are in conflict, and, thus, support the trial court's denial of the JNOV.

C. ICO Waived the Breach By Not Arbitrating the Dispute

According to Boeing Satellite, the satellite contract provided a comprehensive and mandatory dispute resolution procedure that required ICO to arbitrate its dispute over Boeing Satellite's failure to provide cost support information under Article 22.3(D). Because ICO, knowing that Boeing Satellite had not provided sufficient information, chose instead to agree to terms on Amendment 25 without first enforcing its right to obtain that information in advance, Boeing Satellite contends that ICO waived its claim for breach of that provision. We agree.[12]

Article 22.3(C) provided ICO with three possible courses of action in response to a Boeing Satellite price proposal to carry out contract changes requested by ICO: (1) if ICO agreed with and accepted the proposal, the contract would be amended to reflect the modification and Boeing Satellite would proceed with the changes; (2) if ICO and Boeing Satellite could not agree, ICO "may direct [Boeing Satellite] to perform the said change, pending resolution of such dispute subject to" [ICO placing any disputed amounts in escrow]; or (3) if ICO did not direct Boeing Satellite to carry out the changes, then Boeing Satellite would perform its existing contract obligations without change.

Article 30 is headed "**DISPUTES AND ARBITRATION**." Article 30.1 states that if, during the course of performance, a dispute arises between ICO and Boeing

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[12] Boeing Satellite also contends that because Amendment 25 was a complete restatement of the satellite contract which, by its terms, superseded the previously restated version in Amendment 7, the contract obligations imposed by Article 22.3 did not survive. Because we reverse on another ground, we need not address that issue. Instead, our analysis is based on the assumption that, because Amendment 7 was the version of the satellite contract still in effect when Amendment 25 was negotiated, certain provisions of Amendment 7, as amended up through Amendment 24, still applied even after Amendment 25 was signed.

Satellite as to either party's rights or obligations under the satellite contract, the parties may give written notice and allow officials from each company to resolve the dispute. Article 30.2 states that "[i]f mutual agreement cannot be reached within [15 days of giving the written notice provided by Article 30.1]," then "such dispute may be referred on the application of either Party for final determination to an arbitration tribunal convened by the London Court of International Arbitration which shall be conducted by three arbitrators in the English language." Article 30.3 states that the arbitration will take place in London, England. Article 30.4 states that the tribunal's arbitration award shall be binding on the parties and enforceable by any applicable court. It also said the arbitrators' fees and expenses would be split between the parties and that each party would bear its own attorney's fees, unless the award provided otherwise. Article 30.5 provided that time was of the essence with regard to Article 30's dispute resolution time limits.

Article 34 was captioned "**LIMITATION OF LIABILITY**." Article 34.2 provided that "THE WARRANTIES, OBLIGATIONS AND LIABILITIES OF [Boeing Satellite] AND REMEDIES AGAINST [Boeing Satellite] WHICH ARE EXPRESSLY SET OUT IN THIS CONTRACT ARE EXCLUSIVE. . . . WITHOUT PREJUDICE TO THE FOREGOING, THE PROVISIONS OF THIS ARTICLE 34.2 SHALL APPLY WITH RESPECT TO ANY BREACH OF THIS CONTRACT FOR WHICH THERE IS A STATED REMEDY, INCLUDING . . . ANY INFORMATION, INSTRUCTIONS, SERVICES, OR OTHER THINGS PROVIDED PURSUANT TO THIS CONTRACT."

ICO contends that arbitration was permissive, not mandatory, because Article 22.3(C) said ICO "may" direct Boeing Satellite to complete a requested change pending resolution of the dispute, instead of using the mandatory term "shall," as was used in other contract provisions. ICO also contends that: (1) Article 34.2 does not apply because it refers to exclusive remedies, and arbitration is a procedure, not a remedy; and (2) ICO complied because it filed for arbitration in June 2004, and Boeing Satellite responded by suing instead of petitioning to compel arbitration.

We begin with the rules applicable to the interpretation of arbitration provisions. Because there is no conflicting extrinsic evidence concerning the meaning of the satellite contract's dispute resolution procedures, we exercise our independent judgment to interpret those provisions as a matter of law under the rules of contract interpretation. (*Segal v. Silberstein* (2007) 156 Cal.App.4th 627, 633 (*Segal*).)

The language used in a contract controls our interpretation so long as it is clear and explicit. We view the contract as a whole, avoiding a strict or piecemeal construction approach. If possible we give effect to every provision and avoid a construction that renders a provision surplusage. (*Segal, supra,* 156 Cal.App.4th at p. 633.) If an agreement can be interpreted in more than one way, we construe it in the way that makes it lawful, operative, definite, reasonable, and capable of being put into effect, and we avoid an interpretation that would make the contract harsh, unjust, or inequitable, or that would lead to an absurd result. Because the public policy of California favors arbitration, we will interpret an agreement so as to require arbitration unless we can say with assurance that an arbitration clause cannot reasonably be interpreted to cover a dispute or otherwise cannot be enforced. (*Ibid.*)

Our reasoning in *Segal, supra,* 156 Cal.App.4th 627, leads us to the conclusion that ICO was required to arbitrate its dispute over the Amendment 25 costs and Boeing Satellite's refusal to provide the cost-support data, and that ICO waived its contractual right to dispute those costs or receive that information when it agreed to Amendment 25 without doing so.

In *Segal,* we reversed a trial court order denying a petition to compel arbitration of contract disputes arising out of several related joint venture agreements. Two of those agreements contained clauses that said "any action" to enforce or interpret them "shall be settled by arbitration," but also provided that arbitration was "the exclusive dispute resolution process" in Texas, but was "a nonexclusive process elsewhere." When an action for breach of those agreements was brought in California, the trial court denied the other party's petition to compel arbitration because it read the arbitration provisions to mean that arbitration was merely optional in this state.

We held that the trial court erred, in part because "shall" is a mandatory term and the agreements said that any action "shall" be arbitrated. However, the use of that term was only one factor in our analysis. Even though the agreements used the term "nonexclusive process" for actions outside of Texas, "the entire [arbitration] provision is geared toward the arbitration process and does not appear to provide for civil litigation as a dispute resolution option. For instance, the clause designates the applicable arbitration rules, describes the process for commencing arbitration, states where a Texas arbitration will be held, requires 'the arbitrator' to apply Texas law, provides that the parties shall equally share initial arbitration costs, awards the prevailing party its attorney's fees and costs 'incurred in connection with the arbitration,' states that the arbitrator's decision will be final and binding, and allows entry of judgment on that decision in any court with jurisdiction over the matter. By contrast, after stating that all actions [which includes lawsuits] must be arbitrated, the provision never again mentions civil litigation and says nothing about costs and attorney's fees in the event a civil action were to be brought to enforce or interpret the operating agreements." (*Segal, supra,* 156 Cal.App.4th at p. 634.)

The other reason we concluded arbitration was required outside of Texas despite the nonexclusive tag hung on such proceedings was that doing otherwise would lead to an absurd result because it would mean that an action to enforce the agreement brought in Texas, the home state of the entities, would be subject to mandatory arbitration, with costs and fees awarded to the winner, while actions brought anywhere else could end up in court, with no provision for attorney's fees and costs for the prevailing party. "We can think of no good reason why a business entity or its investors would agree to being sued out of state perhaps thousands of miles away from where they do business while requiring arbitration in their home state only." (*Segal, supra,* 156 Cal.App.4th at pp. 634-635, fn. omitted.)

Although we recognized the inherent ambiguity of the arbitration provisions, we concluded that under the best possible reading, the term "nonexclusive process" referred to less costly alternative dispute resolution procedures such as mediation or conciliation. That interpretation at least satisfied the arbitration provision interpretation rule that

favored arbitration unless the provision could not reasonably be construed to cover the dispute. (*Segal, supra,* 156 Cal.App.4th at p. 635.)

Setting aside the "shall" versus "may" issue, the facts in *Segal* neatly parallel those here. First, unlike the "nonexclusive process" language in the *Segal* arbitration provisions, Article 34.2 states that the remedies against Boeing Satellite expressly set out in the satellite contract *are* exclusive. We reject ICO's contention that arbitration is a procedure, not a remedy, and that the term "remedies" in Article 34.2 refers to the types of relief that may be awarded. A remedy is the means by which a right may be enforced or a wrong redressed. (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 592.) Numerous decisions refer to arbitration as a remedy. (See *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 326 [discussion section heading labeled "Availability of arbitration or other remedies."]; and at p. 327, referring to the "arbitration remedy"]; *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42* (1971) 4 Cal.3d 888, 894-895 [referring to "contractual arbitration remedy"]; *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 217, fn. 3 [same]; *Squire's Dept. Store, Inc. v. Dudum* (1953) 115 Cal.App.2d 320, 326 [referring to choice between arbitrating a dispute or suing in court as "election of remedies"].) When Article 34.2 refers to remedies set out in the contract as exclusive, it therefore includes arbitration.

Second, as in *Segal*, the satellite contract does not appear to contemplate civil litigation as a dispute resolution option. Instead, Article 22.1 provides that British law governs the interpretation of the contract, and that the United Nations Convention on the International Sale of Goods was not applicable.[13] Article 30 specifies that the arbitration must be convened by the London Court of International Rules, describes the process for

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13 Amendment 25 changed that provision to state that the satellite contract was governed by California law. However, as mentioned in footnote 24, *ante,* when ICO was negotiating what would become Amendment 25, the restated version of the contract embodied in Amendment 7 was still in effect. Accordingly, ICO's right to receive cost support information depends on that version of the satellite contract. Neither party has ever argued that British law governs our interpretation of the satellite contract, however. We therefore deem the issue waived, and construe the agreement under California law.

initiating arbitration, states where the arbitration must be held, provides that the parties shall split the arbitrator's fee and bear their own attorney's fees unless the award specifies otherwise, states that the arbitrator's decision shall be final and binding, and allows entry of judgment on that award in any court with jurisdiction. Where the *Segal* provisions at least once referred indirectly to lawsuits, the satellite contract makes no mention of civil litigation and says nothing about costs and attorney's fees in the event a civil action was brought. (*Segal, supra,* 156 Cal.App.4th at p. 634.)

Third, we read the satellite contract's various provisions as establishing a comprehensive and exclusive process that was designed to quickly resolve any disputes while both parties continued to perform under the contract. Article 22.3(C) gave ICO three options in response to a price proposal from Boeing Satellite for changes requested by ICO. ICO could agree to the price and Boeing Satellite would perform the changes, ICO could reject the price and Boeing Satellite would continue to perform its existing contract obligations, or ICO could dispute the bid, place the disputed amount in escrow, and require Boeing Satellite to perform the changes "pending resolution of such dispute . . . ." The resolution process that initially would take place had to be the informal meet and confer session between officials of the two companies, followed by arbitration if no agreement could be reached, as provided by Articles 30.1, 30.2, and 34.2. Given the relatively speedy nature of arbitration when compared to litigation, it would be an absurd result indeed to require Boeing Satellite to carry out changed work while ICO took the matter to court to resolve a price disagreement, especially given Article 30.5's statement that time was of the essence in resolving contract disputes.

In short, just as the term "nonexclusive remedy" in *Segal* might have suggested arbitration was optional in that case, a contract's use of such a term is not necessarily dispositive of the issue. Applying that reasoning here, when the satellite contract is read as a whole its use of the term "may" arbitrate does not mean arbitration was permissive.

The same reasoning applies to the price information clause. Article 30's dispute resolution process applies without limitation to disputes concerning either party's rights or obligations under the satellite contract, and therefore surely applies to Article 22.3(D)

and ICO's right to cost support data. That Articles 22.3(C) and (D) are found in the same article, under the heading "Changes Requested by [Boeing Satellite] or [ICO]," is surely no coincidence. If ICO disputed the amount of a Boeing Satellite bid for changed work, then that would be the time to request the cost support data that ICO bargained for. It makes no sense for ICO to say that after Boeing Satellite refused to turn over the information, ICO could forego arbitration, go ahead and agree to a price, have Boeing Satellite perform under that agreement, and then insist that ICO breached the contract because it did not supply the information.

Next, we consider the effect of the use of the permissive term "may" in Article 22.3(C) instead of the mandatory term "shall," when describing ICO's options when it disagreed with a Boeing Satellite price change proposal. ICO contends that because the provision said it "may" direct Boeing Satellite to perform the changes pending resolution of the dispute, that it was not required to do so in order to assert a claim that Boeing Satellite breached Article 22.3(C). We disagree.

First, we observe that ICO's argument concerning the use of permissive rather than mandatory language is limited to the satellite contract's use of the word "may" when describing ICO's options in response to an objectionable Boeing Satellite price bid. Curiously absent from its argument is any reference to Article 30.2, which states that if a dispute cannot be resolved by mutual agreement, then either party "may" refer the dispute for arbitration. ICO therefore appears to contend that it did not have to arbitrate the price information dispute at that time because directing Boeing Satellite to perform the changed work pending resolution of the dispute was merely optional, not because arbitration itself was an optional means of dispute resolution.

Second, the parties' use of the term "may" in either provision does not make arbitration of the price information dispute optional when the various provisions applicable to dispute resolution are read together. As just discussed, we read Article 34.2 as providing that arbitration is the exclusive remedy for disputes that cannot be resolved

by mutual agreement.[14] Furthermore, the article expressly applies "to any breach of this contract for which there is a stated remedy, . . with respect to . . . *any information* . . . *provided pursuant to this contract.*" (Italics added.) The cost data information required under Article 22.3(D) clearly falls within the sweep of that provision because it is information provided pursuant to the contract.

When the parties said ICO "may" direct Boeing Satellite to perform changed work pending resolution of a dispute over the price, and "may" refer to arbitration a dispute that could not be resolved by mutual agreement, we believe they were merely laying out the various options that ICO could follow under Article 22.3(C): accept the price, reject the price and abandon the proposed changes, or require Boeing Satellite to carry out the changes while they tried to resolve the dispute by agreement or arbitration. In short, the only thing optional under Article 22.3(C) was the choice between the three courses of action open to ICO in response to a Boeing Satellite bid for changed performance. If a dispute existed and could not be resolved by agreement or by abandonment of the proposed changes, it had to be arbitrated. (*Erickson v. Aetna Health Plans of California, Inc.* (1999) 71 Cal.App.4th 646, 656-658, and cases cited therein (*Erickson*).)

We recognize that the contract uses the mandatory term "shall" in other provisions concerning dispute resolution, and that Articles 22.3, 30, and 34 could have been better drafted.[15] Even so, while it is a factor that we consider, the use of the term "shall" in

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[14] Articles 17.2 and 17.3 provide a method for either party to terminate the contract for defaults caused by the other party's bankruptcy, insolvency, or inability or failure to make payments, and states that those remedies "shall" be exclusive in lieu of any others provided elsewhere in the contract. ICO contends this shows the parties knew when to use mandatory language, implying that that the language of Article 34.2 is not mandatory. However, Article 34.2 states that the remedies against Boeing Satellite set out in the contract "are exclusive," which is tantamount to providing that those remedies shall be exclusive.

[15] In fact, Amendment 25 changed Article 30.2 to state that disputes that cannot be resolved by mutual agreement "shall be settled by arbitration . . . ." The parties do not mention this change, and we view it as nothing more than a clarification of the parties' obligations under previous versions of the satellite contract.

other parts of the contract does not override our conclusion, which is most consistent with the principles of contract interpretation that are applicable to arbitration provisions. (*Erickson, supra,* 71 Cal.App.4th at p. 658.)

Finally, ICO's reliance on its arbitration demand made after it terminated the satellite contract does not undo its failure to arbitrate the price information dispute at the proper time – before agreeing to the terms of Amendment 25.

D. The Doctrine of Implied Waiver Also Bars ICO's Claim

Because ICO agreed to accept the price set for Amendment 25 despite ICO's knowledge that it never received the information it requested under Article 22.3(D) of the satellite contract, Boeing Satellite contends that ICO impliedly waived that breach of contract as a matter of law. As a result, Boeing Satellite contends, the trial court erred by denying its JNOV motion on that ground. We agree.

Waiver is the intentional relinquishment of a known right after knowledge of the facts. It may be express, based on the words of the waiving party, or it may be implied, based on conduct indicating the intent to relinquish the right. The party claiming that a waiver occurred has the burden of proof by clear and convincing evidence, and doubtful cases will be decided against a waiver. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31.)

The existence of a waiver is ordinarily a question of fact, and we will defer to the trier of fact's finding on the issue so long as it is supported by substantial evidence. (*Hennefer v. Butcher* (1986) 182 Cal.App.3d 492, 503.) However, a judgment finding that a breach of contract occurred may be reversed where the evidence shows conclusively that the plaintiff impliedly waived the right supposedly breached. (*Jones v. Sunset Oil Co.* (1953) 118 Cal.App.2d 668, 673-674 (*Jones*).)

As in this case, *Jones* involved the waiver of a plaintiff's right to receive information from the defendant. The plaintiff (landlord) leased a gas station to the defendant for a term of 10 years. The defendant (tenant) had the option to terminate the lease after five years if not then in default under the lease. In addition to a monthly rent

of $365, the tenant was required to pay one-cent per gallon for gasoline sold in any month where more than 15,000 gallons of gas was sold. As part of this arrangement, on the 20th day of each month, the tenant was required to give the landlord a report showing the amount of the previous month's sales, along with any amounts owed if more than 15,000 gallons had been sold that month. The tenant never sold more than 10,000 gallons of gas in any month, and never provided the landlord with the monthly sales reports. The landlord never asked for those reports until near the end of the first five-year period, after the tenant had given notice of its election to terminate the lease when that period ended. The tenant then provided a report showing that it never passed the 15,000 gallon threshold.

The landlord brought a declaratory relief action, claiming that the tenant could not terminate at the end of the first five years because it was in default of the provision requiring it to provide the landlord with the monthly sales figures. The trial court agreed, and entered a judgment declaring that the tenant was obligated to complete the lease's full 10-year term. Concluding that the landlord's conduct amounted to an implied waiver of the right to receive the monthly sales reports, the court of appeal reversed: "By accepting monthly payments of the minimum rental without demanding sales reports, lessor had waived her right to assert that failure to furnish them constituted such a default of lessee as to preclude its exercise of the option to terminate." (*Jones, supra,* 118 Cal.App.2d at pp. 672-673.) The landlord's failure to reject the tenant's notice of intention to terminate the lease because of the missing reports, and her failure to demand the reports in the ensuing 18 months, during which time the tenant could have cured the default, also estopped the landlord from relying on the default to prevent the tenant's early lease termination. (*Id.* at p. 674.)

Accepting that the existence of waiver or estoppel is ordinarily a question of fact, the *Jones* court nevertheless held that the principal facts were not in dispute. Based on the relevant lease terms and the conduct of the parties, the court held that "[t]he only conclusion we can reach is that lessor had waived her right to declare" a default based on

the sales report requirement because her conduct led the tenant to believe she had waived that right. (*Jones, supra,* 118 Cal.App.2d at pp. 673-674.)

We believe the evidence in this case compels the same conclusion. ICO had the contractual right to make Boeing Satellite back-up its Amendment 25 price offers with the same level of information that its predecessor, Hughes, provided ICO when the satellite contract was first negotiated. According to the testimony of ICO's contract manager, Yves Wesse, this involved wide-ranging access to the engineers working on the project, along with detailed information to explain and justify the price being asked. ICO Senior Vice President Bob Day sent an e-mail to Boeing Satellite setting forth a list of information he wanted in order to understand a price proposal so high that it left him flabbergasted and confounded. In ICO's statement of facts in its respondent's brief on appeal, it claims that despite requests for back-up information for the Amendment 25 proposal, it "received nothing."

Instead of insisting that Boeing Satellite honor its obligation to provide the information, ICO eventually agreed to terms and signed Amendment 25. Both parties performed under the new agreement for six months before ICO terminated the satellite contract for convenience. By doing so, ICO clearly led Boeing Satellite to believe it was no longer insisting on its right to receive cost support data under article 22.3(D) of the satellite contract as a predicate to executing Amendment 25.

ICO contends there is substantial evidence to support the jury's finding that it did not waive its contractual right to obtain cost support information under Article 22.3(D) of the satellite contract. ICO points to evidence that: a waiver of those rights was never discussed during the Amendment 25 negotiations, and that the Amendment did not include such a provision; Boeing Satellite never told ICO that it believed ICO had waived that right when it signed Amendment 25; when ICO terminated the satellite contract, it included a reservation of its rights against Boeing Satellite, and in response Boeing Satellite asked ICO to sign a settlement agreement and release of all claims, showing that neither party believed a waiver occurred or was intended. No release was ever signed.

The linchpin of these evidentiary contentions is ICO's citation to portions of the record that it contends show Boeing Satellite did not "[understand] ICO's claims to have been waived." As a result, ICO contends, there was evidence that ICO's conduct did not "induce a reasonable belief" by Boeing Satellite that ICO had waived its rights. (*Old Republic Ins. Co. v. FSR Brokerage, Inc.* (2000) 80 Cal.App.4th 666, 678.)

To support this contention, ICO relies on the testimony of Dennis Beeson, the Boeing Satellite contract manager of the satellite contract.[16] In that testimony, Beeson acknowledges that Amendment 25 did not include a waiver or release, that he did not respond to the statement in ICO's January 2004 termination notice that ICO was reserving its rights and never told anyone at ICO it had no rights to reserve, and that when ICO wrote Boeing Satellite in February 2004 to accept a proposal modifying the date for ICO's termination liability payment, the letter said ICO's agreement did not affect the validity of its reservation of rights, and Beeson signed the letter on behalf of Boeing Satellite. However, nowhere in this testimony does Beeson provide evidence that Boeing Satellite did not believe ICO's conduct six months earlier amounted to a waiver of its rights under Article 22.3(D) when Amendment 25 was signed, and no such inference can be drawn from that testimony.

The remainder of ICO's evidentiary contentions rest on the notions that: (1) Amendment 25 did not include a waiver provision; and (2) that ICO did not subjectively intend to waive its contract rights. As to the first, as Boeing Satellite points out, ICO effectively contends that in order to show an implied waiver, there must have been an express contractual waiver. Of course, that is not the law. As to the second, ICO's subjective belief is irrelevant when determining whether an implied waiver occurred. (*Rubin v. Los Angeles Fed. Sav. & Loan Assn.* (1984) 159 Cal.App.3d 292, 298.)

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16 Once more ICO fails to specify the portions of testimony that it believe supports its contentions, providing nothing more than citations to entire pages of the reporter's transcript.

Finally, ICO raises two legal issues to support the jury's finding: (1) waiver requires evidence that ICO had full knowledge of the information Boeing Satellite concealed when Boeing Satellite refused to comply with Article 22.3(D); and (2) Article 35.8 of the satellite contract said that waivers of contract rights had to be in writing.

As to the first, ICO relies on *Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.* (2006) 144 Cal.App.4th 1175, 1188-1189. At issue in *Oakland Raiders* was whether a party who knew all the facts surrounding another contracting party's fraud had waived a fraud in the inducement claim after agreeing to a new contract. That rule has no application here, where the issue is whether ICO knew of its right to receive cost back-up information, but signed a new contract without having received it. Waiver of a right conferred by an existing contract turns on knowledge of the existence of the contract right. (*Craig v. White* (1921) 187 Cal. 489, 498; *Pacific Business Connections, Inc. v. St. Paul Surplus Lines Ins. Co.* (2007) 150 Cal.App.4th 517, 525.) There is no dispute that ICO knew it had the right to receive the cost support information and knew that it had not received that information, but chose to sign Amendment 25 despite Boeing Satellite's failure to provide it.[17]

As to the second, even though the satellite contract provided that waivers had to be in writing, such provisions themselves may be waived by the waiving party's conduct. (*Gould v. Corinthian Colleges, Inc.* (2011) 192 Cal.App.4th 1176, 1180; *Bettelheim v. Hagstrom Food Stores, Inc.* (1952) 113 Cal.App.2d 873, 878.) There is no dispute that ICO knowingly passed on its right to the cost support data, then had Boeing Satellite sign Amendment 25 and perform under it for six months. For ICO to seek damages because Boeing Satellite did not provide the information and claim that no waiver occurred "is absurd." (*Gould, supra,* at p. 1180.)

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[17] That knowledge of the contract right is the controlling factor makes even more sense here, where the right at issue was to obtain the information that ICO claims it needed to know before it can be deemed to have waived the right.

3. ***Launch Contract Fraud:*** *JNOV on the Launch Contract Fraud Claim Should Have Been Granted Because the Fraudulent Acts Attributed to Boeing Satellite Did Not Cause ICO's Loss*

A. ICO's Liability Theory For Launch Contract Fraud Claim

ICO's launch contract fraud cause of action was based on two broad categories of conduct: (1) the failure to disclose that Hughes had terminated for default the unassigned Delta III launches; and (2) collusion by, first Hughes, and then its successor, Boeing Satellite, with parent Boeing to frustrate ICO's T4D rights.[18] This conduct included: Hughes never disclosed its September 1999 T4D of the unassigned Delta III launches; Hughes's knowledge that ICO's potential T4D claims on the Delta IIIs posed a financial risk to Boeing Launch of hundreds of millions of dollars; in February of 2000, Boeing executive James Albaugh and Hughes executive Krekel "blessed" a plan to work "toward a nonlegal resolution" of ICO's potential T4D claim; in May 2000, Hughes gave Boeing a guarantee that ICO would remain committed to the Delta IIIs; in July through August 2000, Hughes certified a Boeing Launch invoice as just and accurate and threatened ICO with termination liability if it did not pay, even though Hughes had T4D'd its unassigned launches and had serious doubts about the Delta III's reliability; during this same period (July-August 2000), ICO asked Hughes whether there was any information or facts relevant to the Delta III issue that it had not previously disclosed, and Hughes responded in the negative, therefore failing to disclose all of the above-mentioned information when asked.

After Hughes was acquired by Boeing and became Boeing Satellite, parent Boeing directed Boeing Launch and Boeing Satellite to work together and find ways to eliminate the T4D that ICO had issued. Avoiding a potential $350 million loss to the Boeing companies became so important to Boeing that Boeing Satellite senior executive Jack

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18 The jury was instructed that Boeing Satellite assumed all of Hughes's obligations and liabilities and was therefore responsible for Hughes's conduct. Boeing Satellite disputes its liability for any alleged fraud by its predecessor. We do not decide that issue, but, for purposes of our analysis, assume that Boeing Satellite would be liable for any misconduct by Hughes.

Wormington instructed his ICO team to develop a "Proactive Offensive Strategy" that considered the possibility of stopping work on the ICO project, capturing ICO's share of the satellite transmission spectrum for Boeing's competing satellite communications network, and even taking aggressive steps to create a T4D claim or drive ICO into bankruptcy. As ICO contends, instead of Boeing Satellite working to protect ICO's rights under the launch contract, which it was contractually obligated to do, Boeing Satellite was working with Boeing Launch, under the direction of Boeing, to frustrate those rights.

B. The Trial Court's Launch Contract Fraud JNOV Ruling and Issues on Appeal

Boeing Satellite argues on appeal that the facts that ICO contends it and Hughes concealed or misrepresented had no bearing on ICO's self-negotiated deal to rescind its T4D of the Delta III rockets and accept less than a full refund of the money it had paid for those rockets. Thus, the argument continues, even assuming Boeing Satellite committed affirmative misrepresentation or concealment, its conduct was not the legal cause of any damage to ICO. Rather, ICO decided to withdraw the T4D and accept payment of $155 million after ICO had negotiated directly with Boeing Launch and because it was in ICO's best business interests. According to Boeing Satellite, this failure of proof of causation was fatal to ICO's fraud claim and the trial court erred by denying Boeing Satellite's JNOV motion on that ground.

C. To Recover For Fraud, A Party Must Prove That the Conduct of the Defrauding Party Caused Damage

In addition to the elements of misrepresentation or wrongful concealment, intent to deceive, and justifiable reliance, a plaintiff suing for fraud must prove its losses were proximately caused by the defendant's misconduct. Whatever form the loss takes, the plaintiff must affirmatively prove the causal connection between loss and the misrepresentation/concealment on which plaintiff relied. (*OCM Principal Opportunities*

Fund L.P. v. CIBC World Markets Corp. (2007) 157 Cal.App.4th 835, 870.) In other words, there must be a causal link between the losses and the facts misrepresented. (*Id.* at p. 872.)

"A false representation which cannot possibly affect the intrinsic merits of a business transaction" does not cause loss in the legal sense. (*Hill v. Wrather* (1958) 158 Cal.App.2d 818, 824-825 (*Hill*).) At issue in *Hill* was a cross-complaint for fraud by the majority shareholder in a business against two minority shareholders. The majority shareholder claimed he was deceived into entering a transaction to buy back one minority shareholder's shares and give the other minority shareholder a 50 percent stake in the business because the minority shareholders concealed the fact that they were married to each other. On appeal from an order sustaining without leave to amend the cross-defendants' demurrer to that fraud claim, the court of appeal affirmed because the cross-defendants' marital status had no bearing on the value or merits of the transaction. (*Ibid.*)

However, where the evidence shows that information relevant to the sales price is improperly concealed from the seller, the jury is entitled to find that the buyer's concealment of the information was a proximate cause of the plaintiff's decision to sell for less than he should have. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1166-1167 (*Persson*) [plaintiff shareholder who sold out to defendant shareholder proved the transaction was caused by fraud when the buying shareholder concealed the existence of a new company product that greatly increased the value of the shares, thereby depriving the seller "of information he should have had in making his evaluation of the price at which to sell, and from this deprivation it is reasonable to conclude the concealment was a proximate cause of the damages."].)

D. ICO's Loss Was Not Caused by the Alleged Fraud

The transaction at issue here was ICO's agreement to resolve its Delta III T4D claim by accepting less than a full refund, getting back only $155 million of the $247 million it had paid. We first describe the strengths and weaknesses – the intrinsic merits, according to *Hill* – of ICO's position that it was entitled to T4D and that Boeing Launch

should have refunded the entire $247 million that ICO had paid for the Delta III rockets. The launch contract provided two possible grounds for a T4D: (1) that there were two Delta III launch failures; and (2) that Boeing Launch did not determine that the Delta III was flight-ready within one year of a single launch failure, in this case a launch failure that occurred on May 5, 1999.

(i) The Two Launch Failure Ground Does Not Apply Because the First Launch Failure Was Excused and Did Not Count

A T4D of the launch contract was allowed for excessive failures, which was defined as any two launch failures. The ability to declare a default for excessive failures was subject to one limitation, however: on a one-time only basis, any launch failure whose cause was determined and resolved would not count as a launch failure.

The first Delta III launch in August 1998 was a failure, but, according to Jay Witzling, the Boeing Launch vice president responsible for the Delta III program, the cause of that failure was determined and eliminated before the second launch occurred. If so, then the first launch failure was excused and did not count in determining whether a termination for default was proper because there had been two launch failures. It also means that by the time of ICO's T4D in August 2000, the only remaining ground for declaring a T4D arose from a claim that Boeing Launch had not made the Delta III flight-ready within one year of the May 1999 launch failure.

In its initial round of appellate briefing, ICO did not address Witzling's testimony concerning the excusable failure issue. We asked for and received supplemental briefing on this issue from the parties. ICO again failed to counter or otherwise address Witzling's testimony. Instead, ICO argues that the two launch failures must count because *Hughes* used the two launch failures to justify *its own* separate T4D of the unassigned launches. ICO also contends that Boeing Satellite did not "attempt to invoke" the excusable failure provision at trial because it did not want to contradict Hughes's own interpretation of that clause.

We are not persuaded by these arguments. First, Hughes's attempt to rely on the two launch failures when initiating its own T4D claim has no bearing on whether ICO's claim was justified, especially in light of the uncontradicted evidence that the first launch failure was excusable. It may well be that although Hughes issued a T4D for its unassigned launches that it was not legally justified in doing so.[19] Second, ICO is wrong when it contends Boeing Satellite never raised the point at trial. Boeing Satellite raised the issue during closing argument, telling the jury that "it was premature actually to issue a termination for default until May of 2000 and we know that ICO did issue a termination default a couple of months later . . . ." It raised it again in its JNOV motion, and again in its opening appellate brief. Even ICO said in its appellate respondent's brief that "[t]he second Delta III launch failure occurred on May 5, 1999, *which meant that unless Delta III 'returned to flight' by May 5, 2000, a 'material default' had occurred under the Launch Contract* entitling ICO to the return of its $247 million pre-payment." (Italics added.) We therefore hold that the validity of ICO's T4D claim was based solely on whether the Delta III was made flight-ready by May 5, 2000.

(ii) Evidence Concerning the Flight-Readiness Determination Following the Second Launch Failure of May 5, 1999

Witzling testified that after the second launch failure of May 5, 1999, a return-to-flight board determined that the Delta III was flight-ready in April 2000. In addition to the changes needed to address the cause of the second launch failure, the flight board recommended unrelated changes to the Delta III, Witzling testified. Although the April 2000 report was labeled an interim report, and a "final report" was issued in August 2000, Witzling said the second report had nothing to do with flight-readiness.

ICO's initial round of appellate briefing devoted almost no time to rebutting Witzling's testimony on the flight readiness issue. The only reference to Witzling's testimony in ICO's initial appellate respondent's brief comes at page 17, where it cites to

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[19] Boeing Launch rejected Hughes's T4D of those launches.

two pages from the reporter's transcript as evidence that "Boeing executives conceded that various items of work had not been completed."

Those pages involve the cross-examination of Witzling by ICO about a portion of the April 2000 flight-readiness report which noted that work on a vent duct had not been completed by that time. ICO does not mention Witzling's later clarification that the duct work in question had nothing to do with the launch failure, and was targeted for repair work as part of the flight review board's task of determining whether the Delta III needed upgrades or revisions regardless of whether they were part of the launch failure.

In its supplemental letter brief, ICO identifies other portions of the record that it contends show the Delta III was not truly flight-ready as of May 5, 2000. This includes Witzling's testimony about portions of the April 2000 interim return-to-flight report that refer to work yet to be completed, including the vent duct discussed above, as well as the readiness of the Delta III engine.

ICO also cites other evidence that the Delta III was not flight-ready on time, including its own internal memo of May 16, 2000, reporting on a May 9, 2000, status meeting with Boeing Launch about the Delta III. In it, the author reported that Boeing Launch was still completing its failure investigation activities, which it expected to wrap up at the end of that month. According to the ICO memo, Boeing Launch said that "key" tasks remained, including completion of testing on the combustion chamber. Boeing Launch also reportedly said that a few actions arising from the failure investigation and recent summit review that need to be completed before the failure review was formally closed and a return to flight declared.

We do not have to resolve whether ICO lawfully terminated for default. We have only observed that there were certainly legal impediments to ICO's claims, impediments that undoubtedly caused Boeing Launch to reject the T4D, much as it had rejected Hughes's launch T4D.

With the evidence concerning the merits of ICO's claim that Boeing Launch did not declare the Delta III flight-ready by May 5, 2000, in mind, we next examine whether any misrepresentation or concealment by Boeing Satellite played a part in the negotiation

process for Amendment 25 (satellite contract) and Amendment 5 (launch contract) that led to ICO's decision to accept a $155 million partial refund in exchange for rescinding its T4D claim.

(iii) The Alleged Concealment and Misrepresentation Was Not a Legal Cause Of ICO's Negotiated Compromise of Its T4D

While the evidence just described certainly shows a conflict concerning whether the Delta III was truly flight-ready as of May 5, 2000, the May 16 ICO memo also shows that ICO believed at the time that it was not flight-ready by that date. However, ICO does not point to any evidence that anyone at Boeing Satellite concealed facts that would have strengthened ICO's T4D claim, or made misrepresentations that cast doubt on the validity of ICO's claim, thereby adversely affecting ICO's negotiation with Boeing Launch and causing ICO to accept less than a full refund. Instead, ICO relies on representations or concealments that we conclude had no bearing on the intrinsic merits of this transaction.

The overriding factor in our analysis is the January 2000 memorandum of understanding that ICO negotiated with Hughes, which gave ICO the right to lead all Delta III negotiations with Boeing Launch precisely because ICO was concerned about the possible conflict of interest posed by Boeing's acquisition of Hughes. Pursuant to that memorandum, ICO negotiated and agreed to the terms of Amendment 5, and there is no evidence that it relied on Boeing Satellite during that process.[20]

David Bagley, who was ICO's lead negotiator, said he knew all about the various Delta III failures and was "very comfortable" with ICO's T4D claim and believed ICO had good grounds for getting back all of its money. Bagley testified that he was so comfortable with the claim that at one point during the Amendment 25 and Amendment 5

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20 The jury was instructed that it could consider the memorandum's effect on Boeing Satellite's obligation to use its best efforts to enforce ICO's rights and remedies under the launch contract. The jury was also instructed that ICO's launch contract claims were aimed at Boeing Satellite alone, and that ICO had no claims against Boeing Launch.

negotiations, he proposed setting the launch contract issues aside so the parties could focus on the satellite contract instead.

What this evidence conclusively shows is that ICO negotiated for itself and believed strongly in its default claim, but chose to compromise and accept less than a full refund as part of a package resolution of the launch and satellite contract disputes. This is clear from : (1) Jorgens's and Bagley's testimony concerning the several important benefits ICO received by agreeing to a price for Amendment 25 that it believed was out of line; and (2) the jury's determination that even though Boeing Satellite breached the launch contract, ICO was not entitled to recover any damages because there had been an honest dispute as to whether or not ICO was entitled to a refund on its T4D claim, and ICO agreed to give up that claim in exchange for the partial refund it received.[21]

ICO's reliance on Hughes's claimed failure to disclose its own September 1999 T4D of the unassigned launches is misplaced because ICO's right to T4D did not ripen until May 2000, when, according to ICO, Boeing Launch failed to make the Delta III flight-ready after the second launch failure. Because ICO's right to declare a T4D did not arise until May 2000, we see no connection between any failure by Hughes to disclose its own T4D in 1999 and ICO's decision to accept a partial refund four years later, especially when ICO in fact declared a T4D in August 2000, just three months after the default supposedly occurred.

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[21] There was evidence that both ICO and Boeing Launch had evaluated the strengths and weaknesses of their respective positions, with each concluding that they might not prevail. Day prepared an analysis for ICO in July 2000 that set forth the legal strategy, strengths, and weaknesses in each side's positions. The document said that ICO might T4D based on the one-year flight-readiness deadline, but listed several possible Boeing Launch defenses, including its timely completion of the flight-readiness requirement, ICO's waiver of its right to T4D because Boeing Launch had since remedied the situation, and ICO's own default. In a December 2002 chart that Day e-mailed to another ICO executive, Day wrote that based on the best and worst case scenarios, the chances of "winning [its] legal case," and the chances and timing of any cash refund from Boeing Launch, the "Negotiation Answer" of any settlement meant "ICO should offer $196M [million], but be willing to settle for $160M at signature." Ultimately ICO settled for $155 million, nearly on the mark of the settlement target Day had proposed internally.

Furthermore, although the evidence concerning Hughes's concealment of its T4D appears to be in conflict, in terms of what mattered to ICO, it was not. In November 1999, Hughes's counsel sent ICO's counsel a letter stating that Hughes "intends" to T4D, and recommended that ICO do the same.[22] ICO contends that Hughes's use of the term "intends" was misleading because it suggested Hughes had not yet issued its own T4D, especially when certain Hughes employees told ICO employees in the months that followed that Hughes had not yet done so. However, in September 1999, while in bankruptcy, ICO signed a stipulation giving Hughes the right to T4D on ICO's behalf, with ICO's permission. The November 1999 letter mentions the stipulation and Hughes's recommendation that ICO T4D. Bob Day of ICO admits that he knew Hughes had concerns about the Delta IIIs and was trying to get rid of them. In a November 14, 1999, e-mail, Day recounted a meeting from 10 days earlier during which ICO discussed the launch contract's history, and said, "The biggest issue raised was that [Hughes] wanted to terminate the Delta III contract for cause {5 launches, $250M so far} but ICO did not think that was prudent (even though ICO agreed [to terminating] in the [September 1999] stipulation."[23] There was no evidence that Boeing Satellite discouraged ICO from pursuing its T4D claim.

At bottom, there is no dispute that ICO knew all about the problems with the Delta IIIs, including Hughes's desire to terminate its own unassigned launches for cause, along with its recommendation that ICO do the same, and there is no evidence that Hughes or

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[22] Based in part on this letter, the trial court instructed the jury that a corporation is deemed to have knowledge of all facts in the possession of senior employees, including its general counsel, even if that information is not communicated to other employees. On appeal, ICO does not challenge that instruction. Therefore, at least as of November 1, 1999, ICO had not made a final decision whether to instruct Hughes to terminate for default the Boeing Launch contract, but was aware that Hughes at least intended to do so as to its own unassigned launches, even if ICO was not certain of Boeing Satellite's actual termination.

[23] At the time this e-mail was prepared, Day was working for Teledesic, not ICO, and attended the meetings as part of Teledesic's due diligence investigation before it invested money to bring ICO out of bankruptcy.

Boeing Satellite ever told ICO anything misleading concerning the validity of Boeing Launch's declaration of flight-readiness in April 2000. This is not a case in which Hughes' alleged misrepresentations or concealment caused ICO not to T4D or caused it to delay the T4D to its disadvantage.

Nor does the supposed Hughes guarantee to Boeing to keep ICO committed on the Delta IIIs help ICO. First, Hughes said it would do so, but subject to its rights to terminate for cause. In other words, it would "guarantee" ICO's commitment to the Delta III, unless ICO had the right to T4D. Most important, whatever such a guarantee might have meant, it clearly had no effect because ICO did T4D, and only chose to withdraw the termination when it negotiated Amendment 5. The same is true of Hughes's failure to inform ICO that Boeing Launch stood to lose hundreds of millions of dollars if ICO terminated for default. ICO surely knew that its T4D, if sustained or settled, would cause Boeing Launch to lose money, and we do not see how that information had any bearing on the merits of ICO's claim that Boeing Launch had not made the Delta III flight-ready by May 2000, or on ICO's Amendment 5 negotiations three years later.

ICO also points to correspondence from Hughes in the summer of 2000 that makes it sound like Hughes was certifying the validity of the Boeing Launch invoice for $55 million and threatening ICO with termination liability if it did not pay. When the entire chain of correspondence is read together, however, the record indisputably shows otherwise.

In June 2000, after ICO emerged from bankruptcy, Boeing Launch sent Hughes an invoice for Delta III money it claimed was owed by ICO. Hughes sent this invoice to ICO, and did sign on the form that the invoice was accurate. When ICO objected and claimed Boeing Launch was in default, Hughes wrote and asked ICO to clarify why it believed Boeing Launch was in default. The letter also said that ICO should either declare a termination for default or pay the bill. In response, ICO declared a T4D.

The final Hughes letter was the September 6, 2000, notification to ICO that Hughes had in fact issued the ICO T4D as instructed. The letter also reminded ICO – correctly – that pursuant to the launch contract, all disputed funds had to be placed in

escrow pending resolution of the dispute. Attached to that letter was a letter from Boeing Launch claiming that ICO owed $125 million which had to be placed in escrow pursuant to that provision. Although Day testified that he took this as a threatening letter from Hughes which meant ICO would never get back its money, that conclusion is unsupportable. Hughes's letters did nothing more than seek clarification from ICO about whether, and why, ICO wanted to T4D, and reminded ICO of its contractual obligation to place the disputed funds in escrow. ICO not only was never required to pay the $125 million, its settlement with Boeing Launch generated $155 million to ICO.

Rather than let itself be swayed by these letters, ICO continued to assert its right to terminate for default. There is nothing in this chain of correspondence from which a reasonable jury could find that ICO had been duped into reevaluating and downgrading its assessment of the validity of its T4D, or that otherwise influenced its decision to forego arbitration and negotiate what the jury found was an accord and satisfaction of the Delta III dispute.

Finally, we see no causal link between Boeing Satellite's failure to disclose that Boeing directed Boeing Launch and Boeing Satellite to coordinate a strategy for eliminating ICOs T4D and ICO's decision to settle for less than a full refund. First, ICO asked for Boeing Launch and Boeing Satellite to coordinate so they could resolve all outstanding issues. Second, ICO knew Boeing Launch wanted to eliminate the T4D, and that Boeing Launch had expressly asserted that no default occurred because it had returned to flight-readiness within a year. Third, there is no evidence that anything was said or concealed as a result of this coordinated strategy that affected the merits of the transaction.

At most, the evidence shows that Boeing Satellite hid from ICO that it was not working in ICO's best interests and was trying to help Boeing Launch obtain the best deal possible. This may have been ethically objectionable and arguably a breach of contract. But, because ICO negotiated for itself, absent evidence that Boeing Satellite actually misled ICO about the substance of those negotiations or adversely affected

ICO's negotiation strategy, this conduct did not legally cause ICO to accept less than a full refund of its Delta III payments to Boeing Launch.[24]

4. ***Tortious Interference by Parent Boeing:*** *There Is Insufficient Evidence That Boeing's Conduct Actually Interfered With ICO's Launch Contract Rights and JNOV Should Have Been Granted on That Cause of Action*

A. ICO's Theory of Liability

As a result of the trial court's order for directed verdicts, the only cause of action against parent company Boeing that the jury considered was for tortious interference with the launch contract. ICO contended that the misconduct alleged against Boeing Satellite

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[24] The same is true of ICO's assertion that when ICO asked to see some completed Delta III rockets, Boeing Satellite refused to do so until ICO dropped its T4D claim, and that Boeing Satellite concealed from ICO that it had no launch-ready Delta IIIs. The evidence on this is ambiguous, and could be interpreted to mean that no Delta IIIs were ready for immediate launch. However, the time period and context of the evidence renders it irrelevant to the causation issue because it occurred in the Autumn of 2002, when ICO and Boeing Satellite began their combined Amendment 25 (satellite contract) and Amendment 5 (launch contract) negotiations.

Although some of the evidence cited by ICO indicates that it might have taken several months to ready some of the parts required for launching a Delta III, ICO was not yet ready for an immediate launch at that time. The evidence also shows that ICO knew Boeing Launch was phasing out the Delta IIIs and was switching over to Delta IV rockets. By the time Amendment 5 was signed in July 2003, the parties agreed that no Delta IIIs would be used, rendering the status of the Delta IIIs irrelevant. Most importantly, ICO never explains how the status of the Delta IIIs in October 2002 had any bearing on whether they had been declared flight ready in May 2000.

In the same vein, ICO has at least indirectly suggested that Boeing Satellite's conduct prevented ICO from arbitrating its claim. However, ICO never instructed Boeing Satellite to initiate arbitration proceedings, and points to no evidence that Boeing Satellite somehow misled it into not doing so. Of course, if Boeing Satellite had ignored an instruction to begin arbitration proceedings, that would have been a breach of contract, not a fraud.

ICO also contends that had Hughes been working in ICO's best interests, the two companies could have joined forces and negotiated a far better deal. There is no evidence in the record to support this speculative assertion.

for fraud in connection with the launch contract was in fact directed by parent company Boeing.

Parent Boeing contends that the conduct by which it supposedly interfered with the launch contract did not affect the combined Amendment 5 (*launch contract*) and Amendment 25 (*satellite contract*) negotiations that led to ICO's decision to accept only a partial refund of the money it paid for the Delta III rockets. Therefore, according to Boeing, the trial court erred by denying its JNOV motion on that ground.[25]

B. Parent Boeing's Conduct Did Not Cause ICO to Accept Less Than a Full Refund of Its Delta III T4D Claim

The elements of a cause of action for tortious interference with an existing contract are: (1) a valid contract between the plaintiff and a third party; (2) defendant's knowledge of this contract; (3) intentional acts by the defendant intended to induce a breach or disruption of the contract; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. (*Hahn v. Diaz-Barba* (2011) 194 Cal.App.4th 1177, 1198.) The test is whether the defendant's conduct proximately caused the plaintiff's loss. (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 232-233.)

ICO's cause of action against Boeing for tortious interference with the launch contract with Boeing Satellite is the flip side of the conduct that forms the unsustainable foundation of ICO's claim against Boeing Satellite for fraud in connection with that contract. According to ICO, Boeing was the guiding hand behind the facts that ICO claims were misrepresented or concealed by Boeing Satellite: getting Hughes to agree to work with Boeing toward a nonlegal resolution of the T4D issue and to guarantee that

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[25] The parties raise other grounds to support their respective positions concerning these issues, but we need not reach them. They also raise other issues on appeal that we need not reach: ICO contends the trial court erred by reducing or eliminating the jury's awards of prejudgment interest, and by reducing the jury's punitive damage awards; and Boeing Satellite and Boeing challenge both the size of the punitive damage awards, as well as the court's ability to award such damages due to a contractual restriction against punitive damages.

ICO would remain committed to the Delta IIIs; and having Boeing Satellite and Boeing Launch work together to eliminate ICO's T4D and otherwise get Boeing Satellite to work in the best interests of Boeing, not ICO. According to ICO, all of this conduct, which we described in other sections of our discussion, caused it to accept the $155 million partial refund of its Delta III T4D claim.

We conclude that this conduct did not, as a matter of law, cause ICO to accept a partial refund. As with the fraud claim against Boeing Satellite, nothing in Boeing's conduct caused ICO to devalue its T4D claim or otherwise affected its negotiations on its own behalf in a way that affected the merits of that claim. Accordingly, we reverse the order denying Boeing's JNOV motion on that cause of action.

DISPOSITION

For the reasons set forth above, we: affirm the order granting JNOV to Boeing Satellite on the satellite contract price fraud verdict; reverse the orders denying Boeing Satellite's JNOV motions on the satellite contract breach of contract and launch contract fraud verdicts; and reverse the order denying Boeing's JNOV motion on the verdict finding it liable for tortious interference with the launch contract. As a result, we remand the matter with directions to enter judgment for Boeing Satellite and Boeing on all causes of action. Boeing Satellite and Boeing Corporation shall recover their appellate costs.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

PERREN, J.*

* Justice of the Court of Appeal, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.